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No. 01-159

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

CHARLES AND MILLILE SHARRIEF
Personal Representatives for
Quanetta Buchannon, Deceased,

Petitioners,

v.

REBECCA GERLACH, M.D.

Respondent.

## RESPONDENTS' BRIEF IN OPPOSITION

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## PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

The "List of Parties" set forth in the Petition at page ii adequately identifies all relevant parties to this proceeding.

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## REASONS FOR DENYING THE WRIT

To the extent that Petitioners have set forth United States Constitutional challenges to the opinion of the Alabama Supreme Court styled *Charles Sharrief and Millie Sharrief as personal representatives of Quanetta M. Buchannon, deceased v. Rebecca Gerlach, M.D.* and identified as Case Number 199172, such challenges were not presented to, nor ruled upon by, the Alabama Supreme Court and, therefore, have not been preserved for review by this honorable Court, as shown more specifically below.[1]

### I.

**Plaintiffs' present constitutional challenges to the decision of the Alabama Supreme Court, affirming the trial court's denial of several post trial motions seeking discovery regarding the jury's deliberations, were not preserved for review by this Court.**

With very rare exceptions, the United States Supreme Court has adhered to the rule, adopted pursuant to 28 U.S.C. § 1257(a) (1993), that a federal claim, presented upon petition for writ of certiorari, will not be reviewed unless it was either addressed by, or properly presented to, the state court that

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[1] At the outset of their Petition for Writ of Certiorari, in their "Questions Presented", specifically "Questions" 1(B), 2, and 4, Petitioners set forth several issues which clearly involve only matters related to Alabama state law and which in no way implicate any right guaranteed to the Petitioners under any federal constitutional or statutory authority. Therefore, this Court lacks authority to hear such claims. 28 U.S.C. § 1257 (1993).

rendered the decision the review of which is sought. *Adams v. Robertson*, 520 U.S. 83, 86, 117 S. Ct. 1028, 1029, 137 L. Ed.2d 203, 208 (1997). The issue presented for review upon petition for writ of certiorari to this Court must have been presented to the highest state court in such a manner that it was necessarily decided by such state court in order for review by the United States Supreme Court to be proper. *Lear, Inc. v. Adkins*, 395 U.S. 653, 675, 89 S. Ct. 1902, 1913, 23 L. Ed.2d 610 (1969). Moreover, when the highest court's opinion is silent on the federal question sought to be reviewed, the United States Supreme Court will assume that the issue was not properly presented, *Adams*, 520 U.S. at 86, 87, (citing *Board of Directors of Rotary Int'l. v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S. Ct. 1940, 1948, 95 L. Ed.2d 474 (1987)). The aggrieved party bears the burden of defeating this assumption by demonstrating that the state court had a fair opportunity to address the federal question sought to be reviewed. *Adams*, 520 U.S. at 87, (quoting *Webb v. Webb*, 451 U.S. 493, 501, 101 S. Ct. 1889, 1894, 68 L. Ed.2d 392 (1981)).

To the extent the Petitioner has set forth United States Constitutional challenges to the decision of the Alabama Supreme Court affirming the trial court's denial of several post trial motions seeking discovery regarding the jury's deliberations, such challenges are not properly before this Court because they were neither presented to, nor ruled upon by, the Alabama Supreme Court. Specifically, Petitioners seek to challenge that portion of the Alabama Supreme Court's decision affirming the trial court's denial of post trial discovery and the striking of several affidavits regarding jury deliberations by alleging for the first time before this Court that those

decisions violate their right to a fair and impartial jury as guaranteed by the 1st, 6th, and 7th Amendments to the United States Constitution and their right to due process and equal protection as guaranteed by the 5th and 14 Amendments.[2] However, Petitioners have not shown that any such challenges, or citations to authority supporting the same, were submitted to the Alabama Supreme Court for review upon the Petitioners' appeal to that court.[3] Moreover, the opinion of the Alabama Supreme Court contains no discussion of any United States Constitutional issue related to the denial of Petitioner's post trial motions seeking discovery regarding the jury's deliberations. (See Pet. App. A, at A-6 - A-11).

Because the Alabama Supreme Court was not presented with the United States Constitutional and 42 U.S.C. § 1983 challenges as alleged in the present Petition, such challenges cannot provide the basis for this Court's review of the Alabama court's opinion. *Adams* and *Lear, Inc., supra.*[4]

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2

In their list of "Constitutional and Statutory Provisions Involved", on page 3 of their Petition, Petitioners list 42 U.S.C. § 1983 as "involved" in this matter. However, no challenge pursuant to this statute was presented to the Alabama Supreme Court upon appeal, and Petitioners have not cited to any authority or made any argument regarding how said statute is implicated in their present Petition.

3

Petitioners have not submitted by Appendix, or otherwise, their Appellant's Brief to the Alabama Supreme Court which sets forth their claims of errors and supporting arguments on appeal.

4

Respondent notes that Petitioners have failed to even cite in their Petition to this Court relevant authority which specifically purports to demonstrate how the decision of the Alabama Supreme Court runs afoul of any United States Constitutionally or statutorily

Although the U.S. Constitutional challenges set forth in this Petition were not preserved for review by this Court, without waiver of this issue, Respondent would briefly note that the Alabama Supreme Court's decision(s) regarding the denial of post trial discovery and the striking of several affidavits regarding the jury's deliberations does not violate any right of the Petitioners guaranteed by the United States Constitution and is in accordance with both federal and state authority regarding the admission of such evidence.

Initially, the Court should note that the trial court's decisions regarding Petitioners post trial attempts to obtain testimony from jurors regarding their deliberations, was, under Rules 27 and 30 of the Alabama Rules of Civil Procedure, subject to review pursuant to an abuse of discretion standard as indicated by the Alabama Supreme Court in its opinion. (Pet. App. A, at A-6, A-7). The Alabama Supreme Court affirmed the trial court's quashing of Petitioner's post trial motion to issue subpoenas to the jurors on the basis that the Petitioners had failed to comply with Rule 27 of the Alabama Rules of Civil Procedure in that they had failed to file any motion with the court for authorization to take such depositions. Petitioners have not shown how the procedural requirements of Rule 27 Ala.R.Civ.P. could not serve as an independent and adequate state law ground sufficient to uphold the Alabama Supreme Court's decision regarding the same. See *Adams*, 520 U.S. at

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protected right. While the Petitioners have, briefly, cited federal precedent for the boilerplate existence of the right allegedly violated, they have not provided citation to any authority to demonstrate *how* such right was allegedly violated by virtue of the Alabama Supreme Court's opinion.

87, (citing *Hathorn v. Lovorn*, 457 U.S. 255, 262-265, 102 S. Ct. 2421, 2426-2428, 72 L. Ed.2d 824 (1982)).

As noted in the Alabama Supreme Court's opinion, all of the Petitioners' arguments concerning post trial discovery regarding the jury's deliberations were based on three affidavits which were obtained prior to the trial court's quashing of the subpoenas seeking to depose the jurors. (Pet. App. A, at A-7, A-8). Those affidavits included that of Charles Sharrief, Plaintiff below and Petitioner herein, and two jurors. The affidavit of Charles Sharrief consisted, in its substantive entirety, of a list of statements allegedly made to him by jurors after the trial. (Pet. App. A, at A-8). The trial court struck the Affidavit of Charles Sharrief on the basis that it was comprised entirely of "hearsay" as defined under Rule 802 of the Alabama Rules of Evidence. (Pet. App. A, at A-8). Upon appeal, the Petitioners did not challenge by citation to any authority, the propriety of the court's order striking the affidavit of Sharrief on this basis and the Alabama Supreme Court affirmed the same. (Pet. App. A, at A-8).

In addition, the trial court struck the affidavits of the two jurors submitted by Petitioners in support of their post trial discovery motions on the grounds that the substantive testimony contained therein was not properly admissible to impeach the jury's verdict under Rule 606 of the Alabama Rules of Evidence which is, as the Alabama court noted, substantively similar to its federal counterpart. (Pet. App. at A-7 - A-11). In reaching its decision affirming the striking of these affidavits pursuant to Rule 606, Ala. R. Evid, the Alabama court cited federal opinions from the 7th, 2nd, and 5th Circuits, each interpreting Rule 606(b) of the Federal Rules of

Evidence.[5] Petitioners have not shown by citation to any authority how the Alabama Supreme Court's interpretation and application of Rule 606 of the Alabama Rules of Evidence runs afoul of any United States Constitutional Amendment or right of the Petitioners guaranteed thereunder.

## II.

**Petitioners have at no point made, much less preserved, any federal challenge to the racial makeup of the jury venire.**

Petitioners maintain in their Petition at page 5 that "At the trial of this matter, the Sharriefs timely raised a *Batson*

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In its opinion, the Alabama Supreme Court stated:

> In Peveto v. Sears, Roebuck & Co., 807 F.2d 486, 489 (5th Cir. 1987), the United States Court of Appeals for the Fifth Circuit held that "by implementing Rule 606(b), Congress has made the policy decision that the social costs of such error are outweighed by the need for finality to litigation." The Seventh Circuit has held that Rule 606(b) is designed "to protect the judicial process from efforts to undermine verdicts by scrutinizing the jurors' thoughts and deliberations." United States v. Ford, 840 F.2d 460, 465 (7th Cir. 1988). Other courts of appeals for the federal circuits have stated that Rule 606(b) promotes "free and uninhibited discourse during deliberations." Attridge v. Cencorp Div. of Dover Techs. Int'l., Inc. 836 F.2d 113, 116 (2d Cir. 1987); Maldonado v. Missouri Pac. Ry., 798 F.2d 764 (5th Cir. 1986).

(Pet. App. A, at A-9).

objection to the jury venire containing one African American out of 36 veniremen" and that "their case was ultimately tried to an all white jury." However, the Alabama Supreme Court in its opinion maintained that it had found no objection to the composition of the jury or a *Batson* objection to the striking of the one black member of the venire in the record. (Pet. App. A, at A-11).[6] Therefore, because Petitioners' present federal challenges to the racial makeup of the jury venire were not presented to the Alabama Supreme Court for review and were not addressed by said court, they are not properly before this honorable Court for review. *Adams* and *Lear, Inc., supra.*

## III.

**Petitioners have failed to offer any compelling reason pursuant to Rule 10 of the Rules of the United States Supreme Court for the granting of this Petition.**

The Petitioners have not set forth any compelling reason for the granting of a writ for certiorari to the Alabama Supreme Court as generally required and described in this

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[6] In its opinion, the Alabama Court quoted extensively from the record regarding a purported *Batson* challenge made by the Petitioners challenging the Respondent's use of seven of ten of its peremptory strikes to remove women from the panel, leaving three women on the jury. Nothing in this exchange remotely indicates any *Batson* challenge to the racial makeup of the jury venire. (Pet. App. A, at A-13 - A-15). Moreover, Petitioners have not presently sought review by this Court of the Alabama Court's ruling affirming the trial court's finding that the Petitioners failed to present a prima facie case of improper peremptory strikes on the basis of gender. (Pet. App. A, at A-15, A-16).

Court's Rule 10 and, consequently, this Petition is due to be denied. See *Haitian Refugee Center, Inc. v. Baker*, 502 U.S. 1122, 112 S. Ct. 1245, 117 L. Ed.2d 477 (1992) (mem.) (Thomas, J. regarding the denial of certiorari).

## CONCLUSION

For all of the foregoing reasons, Respondent respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,
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